United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1544

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B/B

THE UNITED STATES OF AMERICA,
Appellee-Plaintiff,

vs.

LEONARD JOHNSON and LEROY McCLAMB,
Appellant-Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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Appellant-Defendants.

Appeal from the United States District Court
for the Western District of New York

BRIEF FOR APPELLEE

Issues Presented

1. Did the Government establish sufficient proof that the checks set forth in the indictment had been stolen from the mails?

2. Is a failure to prove that checks were stolen from the mails a defect which bars retrial of defendants on double jeopardy grounds?

3. Was testimony by an undercover agent, that defendant Johnson admitted his intention to have more checks for sale

the following month at a lower price, properly admitted into evidence as reflecting knowledge, intent, plan, etc.?

4. Was the absence of an immediate cautionary instruction to the jury, regarding testimony of defendant Johnson's future plans, proper under the circumstances?

5. Did the trial court properly allow use of two prior criminal convictions for impeachment of defendant McClamb, should he choose to testify at trial?

Statement of Facts

On October 1, 1975 a Postal Letter Carrier, Floyd Thomas, sorted the mail for his route at a postal substation in Buffalo (App. 2). The letter carrier's procedure was to bundle the mail in the order of streets and houses for delivery; he then carries some mail with him as he begins his route, sending the excess to relay boxes by mail truck (App. 3).

Once he arrived in the vicinity of his mail route, he delivered the mail in its orderly sequence, making an initial pickup of mail from his locked relay box, delivering that bundle, and working his way back again to the same relay box to pick up the final bundle of mail for delivery (App. 4, 5). Included on the carrier's route was Purdy Street, and he testified that on October 1, 1975 the names and addresses set forth in the indictment were among the recipients of mail on his route (App. 4, 11, 17, 18, 19). The Purdy Street mail that day, as usual for the first day of the month, included a large number of SSI (Supplemental Security Income) and welfare checks (App. 8, 11, 18, 19).

While this Purdy Street mail, including checks, was sorted and bundled by Thomas and was present at the relay box

when he first stopped there, when he returned to pick up his final load of mail he found the relay box had been opened, the lock damaged, and the Purdy Street mail for numbers 330 to 208 Purdy Street and 309 to 323 Purdy Street, missing (App. 17). (This encompassed the addresses of the victims set forth in the indictment (App. 5, 6, 7)).

A few days later, on October 6, 1975, Secret Service Special Agent Robert Pochopin was contacted by an informant and a meeting was planned for Special Agent Pochopin to make an undercover purchase of U. S. Treasury checks (App. 29). The next morning, October 7th, Special Agent Pochopin and the informant met with the defendants Johnson and McClamb in an auto (driven by Johnson, with McClamb in the rear seat) in the parking lot of a local Buffalo restaurant where Special Agent Pochopin negotiated for the purchase of twenty one U. S. Treasury checks from the two defendants (App. 29, 32). Johnson asked for $1,000 for approximately $2,000 in checks, Pochopin protesting that the price was too high (App. 39, 44). Johnson explained that the price was high due to the small number of checks, but that if the agent were interested the following month Johnson would have a greater number and would ask for a lower percentage of their face value (App. 44, 59). They agreed on a price of $750; McClamb then handed twenty one checks to the agent (App. 40, 45). The agent gave a signal to other surveillance agents in the area, and the defendants were arrested (App. 45, 46).

The twenty one checks, all U. S. Treasury checks, all dated October 1, 1975, all payable to residents of the two and three hundred block of Purdy Street, formed the single count in the indictment against each defendant (App. 90, 91).

POINT I

The Government established sufficient proof that the checks set forth in the indictment had been stolen from the mail.

At trial the Government's proof, by stipulation, established that twenty one residents of a two block section of Purdy Street regularly received in the mail monthly United States Treasury checks on or about the first of each month, that their October 1, 1975 checks failed to arrive and that they never authorized any other person to have possession of their respective checks. The Government produced photocopies of the United States Treasury Department proof-of-claim forms filed by each of the twenty-one residents further corroborating their non-receipt of the October 1, 1975 checks.

The first witness for the Government was Floyd Thomas, a Post Office letter carrier of 22 years, who in October 1975 was assigned to a route encompassing the two block section of Purdy Street. Mr. Thomas testified that on October 1, 1975, as was his usual course of proceeding, he sorted the mail for his route, bundled it by street, and prepared it for delivery by truck to his relay box at Masten and Northland Streets (App. 2). The witness specifically recalled seeing mail for the Purdy Street addresses when sorting, and again at his relay box when he removed it from the delivery bag and placed it on the upper shelf of the box (App. 4, 8). Mr. Thomas testified that from a postal standpoint the mail is always heavier on the first of the month because of the large number of checks in the mail (App. 8). He further stated that from his experience and knowledge as a mail carrier the checks in the mail on the first of the month were welfare and SSI (Supplemental Security Income) checks, and that on October 1, 1975 in particular there were SSI checks for residents of both sides of

Purdy Street (App. 9, 11, 12). After delivering his second bundle of mail Mr. Thomas returned to the relay box and found the door open, the lock damaged and the Purdy Street mail gone (App. 4, 5). The witness stated that the Purdy Street mail he had specifically seen in the box some 45 minutes earlier and had placed on the upper shelf was missing, and that the names and addresses of the checks in the indictment would have been included in the mail that should have been in the box (App. 17). That mail would have gone to the addresses from 330 Purdy down to 208 Purdy and from 309 Purdy to 323 Purdy (App. 17), coinciding with the addresses of the checks listed in the indictment (App. 5, 6, 7, 20).

In a prosecution under 18 United States Code, Section 1708 for unlawful possession of United States Treasury checks the Government must establish beyond a reasonable doubt the existence of three essential elements: One, that the defendants were in possession of the checks; two, that the checks were stolen from the mails; and three, that the defendant knew the checks were stolen. *Barnes v. United States,* 412 U.S. 837 (1973); *United States v. Robinson,* 545 F.2d 301 (C.A. 2 1976). Defendants on appeal do not challenge the existence of points one and two but instead maintain that the United States failed to establish that the twenty-one United States Treasury checks were stolen from the mail. It is the Government's position that the proof adduced at trial is sufficient to raise an inference that the checks were stolen from the United States Post Office relay box at Masten and Northland Streets and that the jury was entitled to so conclude.

At the outset it should be noted that there is more than one method of proving that an item was stolen from the United States mail, and that it is entirely proper to establish such facts circumstantially. *United States v. Baker,* 50 F.2d 122

(C.A. 2 1931); *United States v. Fassoulis*, 445 F2d 13, 17 (C.A. 2 1971) cert. denied 404 U.S. 835 (1971). Appellants in their brief cite only one of several methods, that being to produce evidence that a letter was properly mailed, never received by the addressee and found in the unlawful possession of the defendant. Proof of such facts is generally sufficient to support the inference that the item was actually stolen from the mail. *Cf. United States v. Hines*, 256 F.2d 561, 563 (C.A. 2 1958). In cases involving possession of United States Treasury checks issued en masse, the testimony of a Treasury Department official as to the usual procedure of transmitting Treasury checks by mail is customarily relied upon to establish that a particular check was placed in the mail, although rarely, if ever could an individual single out a particular item in any manner. *United States v. Toliver*, 541 F.2d 958 (C.A. 2 1976); *United States v. Robinson, supra; Webb v. United States*, 347 F.2d 363 (C.A. 10 1965); *United States v. Robertson*, 460 F.2d 1250 (C.A. 5 1972); *Blue v. United States*, 528 F.2d 892, 894 (C.A. 8 1976).

However, in the instant case the Government elected to establish the necessary element of theft from the mails by a different inferential scheme, not by proof of proper mailing but *by evidence that the checks were actually in the mail at a certain time and were stolen from a particular post office repository.* When viewed from this perspective it is clear that *United States v. Robinson, supra,* relied upon by appellants, is not directly in point. In *Robinson* the Government limited its proof of theft from the mails to that of non-receipt by the payee, neglecting to establish either that the checks were ever properly mailed or ever in the mail. In the face of such a meager offer this Court held "that proof of non-receipt, without more, is insufficient even circumstantially to sustain an inference that the checks were stolen from the mail."

United States v. Robinson, supra, at 304. More directly on point is the Fifth Circuit decision in *Smith v. United States,* 343 F.2d 539 (C.A. 5 1965) where the payees' testimony that they always received their checks by mail, coupled with the co-defendant's statement that he took the checks from a hotel mailbox, was found sufficient circumstantial evidence of mailing. In *Robinson* this Court, while not disagreeing with its holding, found *Smith* "distinguishable because here there was no evidence that anyone took the checks from mailboxes or any other postal repository " *United States v. Robinson, supra,* at 304 n. 4. In the instant case, the United States has offered more than mere proof of non-receipt—it has produced credible evidence that the checks were in the mail on the morning of October 1, 1975 and were taken from the postal repository at Masten and Northland Streets in the City of Buffalo that same day.

In *United States v. Cassell,* 452 F.2d 533 (C.A. 7 1971) the Seventh Circuit found sufficient evidence of mailing where the payee testified that she received Social Security checks since 1953, that she had not received the July 3, 1966 check and had not endorsed it, and in response to her report of theft she received a replacement after being told that the first check was mailed. Of similar import is the decision of the Eighth Circuit in *Blue v. United States,* 528 F.2d 892 (C.A. 8 1976). In *Blue,* the payee testified that he was a cerebral palsy victim for several years, regularly had received Social Security checks through the mails for about 20 years, and that he failed to receive either his medicaid card or Social Security check both dated January 1, 1975 and mailed to the same address. Coupled with the unchallenged testimony of a Postal Inspector that "the checks were mailed out and they were not received by the payee" the Court held that the proof went beyond mere non-receipt of matter that is ordinarily mailed,

and thus was sufficient to support the conviction. *Blue v. United States, supra,* at 894.

In *United States v. Baker,* 50 F.2d 122 (C.A. 2 1931), relied upon by appellants, the Government's proof of mailing was limited to the fact that since the letter moved from New York to Hartford, Connecticut it was very likely that it went by mail, as that is a convenient and customary way to send letters from one city to another. Moreover, in *Baker* there was testimony that the letter might in fact have been delivered by hand. See *United States v. Leathers,* 135 F.2d 507, 511 (C.A. 2 1943).

In order to establish theft from the mails by circumstantial evidence the Government is not required to affirmatively disprove every conceivable alternative theory. *United States v. Zimple,* 318 F.2d 676, 680 (C.A. 7 1963) cert. denied 375 U.S. 868 (1963); *United States v. Mooney,* 417 F.2d 936, 938 (C.A. 8 1969), cert. denied 397 U.S. 1029 (1970). Furthermore, the jury having returned a guilty verdict, the evidence must be viewed most favorably to the Government, *United States v. Bowles,* 428 F.2d 592, 593 (C.A. 2 1970); *United States v. Tropiano,* 418 F.2d 1069, 1074, 1075 (C.A. 2 1969), cert. denied 397 U.S. 1021 (1970), including the indulgence in all permissible inferences in its favor. *United States v. Brown,* 236 F.2d 403, 405 (C.A. 2 1956).

In the absence of a contrary explanation, the jury was entitled to conclude from the testimony of the letter carrier and stipulation that these twenty-one United States Treasury checks addressed and made payable to residents of Purdy Street were at least at the postal substation where sorted by Mr. Thomas on October 1, 1975, and were at the relay box at Masten and Northland. When coupled with the Government's evidence of the defendants' unlawful possession of the checks

it could rationally be inferred that the twenty-one checks were stolen from the mails. *United States v. Hines, supra,* at 564; *United States v. Fassoulis,* 445 F.2d 13, 17 (C.A. 2 1971) cert. denied 404 U.S. 835 (1971). As this Court noted in *United States v. Hines, supra,* at 504 "the jury need not grasp for improbable explanations for instance, that the postman casually lost the letter which this or a confederate found, and which they made no attempt to return as should have been done."

The Government respectfully contends that submission of the case to the jury was proper and that the jury could reasonably infer from the evidence as a whole that the United States Treasury checks were stolen from the United States mails.

POINT II

Failure to prove that the checks were stolen from the mail, as a general legal principle, would bar retrial of defendants on double jeopardy grounds.

In light of *United States v. Wilson*, 420 U.S. 332 (1975) and *United States v. Robinson, supra,* the Government concedes that if this Court were to find that we have failed to establish an essential element of the crime a retrial of defendants would violate their double jeopardy rights.

POINT III

The undercover agent's testimony that defendant Johnson admitted his intention to have more checks for sale the following month at a lower price was properly admitted into evidence as reflecting knowledge, intent, plan, etc.

Judge Elfvin allowed Special Agent Pochopin to testify that during the undercover purchase of the checks the defendant Johnson told him that his asking price for the twenty one checks was high because there was a small quantity, but that the following month, the first part of November, Johnson would have a larger package for sale and the percentage would be much lower (App. 59). Judge Elfvin found that the jury could properly consider this ". . . in deciding upon the state of mind and intention of the defendants at this time and for this purpose." (App. 58).

Defendants' argument that this admission constituted "evidence of another crime" (Appellant's Brief page 15) used to convict of the offense charged is misplaced. It is also difficult to understand their logic in labeling this as "character evidence" used to suggest the defendants are "habitual criminals" (Appellants' Brief pages 15, 16).

Rule 404 of the Federal Rules of Evidence specifically permits evidence of other acts to show "opportunity, intent, . . . plan, knowledge . . . or absence of mistake or accident." It is the Government's contention that when the defendant Johnson explained to Special Agent Pochopin that the following month he would have a large package of checks for sale at a lower percentage, this indicated his opportunity to have committed the acts charged, his intent in possessing these checks, knowledge of his actions, and the absence of

any mistake or accident on this part. This Circuit has made it clear that evidence of other acts or crimes is admissible, if otherwise relevant, except when offered solely to prove criminal character. *United States v. Grady, et al.*, 544 F.2d 598 (C.A. 2 1976); *United States v. Papadakis*, 510 F.2d 287 (C.A. 2 1975); *United States v. Deaton*, 381 F.2d 114 (C.A. 2 1967); *United States v. Keilly*, 445 F.2d 1285 (C.A. 2 1971), cert. denied 406 U.S. 962 (1972). Of course, the trial judge is still to balance all the relevant factors to determine whether the probative value is outweighed by any prejudicial effect. Here, it is submitted that the task was easy, for defendant Johnson's comment that he would have a greater number of checks to sell to the undercover agent the next month—highly similar conduct, to say the least—far outweighs any incidental prejudice to him. *United States v. Deaton, supra.*[1]

Furthermore, the evidence here is not really evidence of another crime or act, but the defendant Johnson's *statement* of an intent to conduct future sales of checks to the undercover agent. It is submitted that as a statement regarding knowledge, plan, intent, etc., it is admissible on a basis distinguished from the considerations of Rule 404 of the Federal Rules of Evidence.

Defendants' reliance on *Massei v. United States*, 241 F.2d 895 (C.A. 1 1957), aff'd 355 U.S. 595 (1958) is thus misplaced. In *Massei* the First Circuit ruled that a defendant's admissions of graft during pre-indictment years was insufficient to support a conviction for tax evasion, absent other direct proof to corroborate graft as a likely source of income. Its holding does not appear to be particularly applicable to the case at

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[1] It is perhaps noteworthy that defendants offer no basis for their conclusion that this particular admission may have "substantially influenced the jury" in their guilty verdict (Appellants' Brief page 15).

bar. *Drew v. United States*, 331 F.2d 85 (C.A.D.C. 1964) involved a prejudicial joinder in violation of the Federal Rules of Criminal Procedure, where on its particular facts the Court found prejudice from trying the defendant on totally separate crimes at the same trial. *United States v. Nemeth*, 430 F.2d 704 (C.A. 6 1970) held that a F.B.I. agent's testimony that a defendant had been previously convicted of a similar type of bank larceny was prejudicial and should not have been admitted. Such evidence, which the Sixth Circuit found to be "particularly objectionable", could not be cured with the vague, incomplete cautionary instruction given by the District Court in that case. It, too, is not applicable to the present case.

POINT IV

Defendant McClamb's failure to request an immediate cautionary instruction regarding the jury's consideration of co-defendant Johnson's statement precludes any claim on appeal that the failure to give such instruction was error.

Defendant McClamb argues on appeal that defendant Johnson's statement about a future sale of checks should have prompted an immediate cautionary instruction by the trial judge for the jury to consider the statement only against defendant Johnson, who made the statement, and not against defendant McClamb. It is submitted that McClamb's failure to request from the Court any such cautionary instruction precludes raising this point now, on appeal. *United States v. Indiviglio,* 352 F.2d 276 (C.A. 2 1965) (*en banc*); *United States v. Papadakis, supra,* at page 295; *United States v. Bozza,* 365 F.2d 206, 214 (C.A. 2 1966). Following the Court's decision to admit the agent's testimony in this point, McClamb's attorney not only failed to request any immediate instruction, she implied to the Court she would be submitting a specific request to charge on this point.

> Miss Handschu: I take exception to the Court's ruling for the defendant McClamb. And I would also ask, Your Honor, if our request to charge don't (sic) cover this area, will the Court—
>
> The Court: I will put that in, but if you have some specific language you want in, you only get it in by handing up a request, and then we can deal with your request. You can rely on my putting it in or ask me to put it in (App. 58).

While Judge Elfvin did not discuss in detail this aspect of Agent Pochopin's testimony in his charge to the jury, he did

give the jury clear instructions on their obligation to consider each defendant separately, weighing only the evidence pertaining to that particular defendant (App. 64, 71, 73, 74, 84, 85). And in any event, McClamb's attorney made no additional requests to the Court following the judge's charge.

> (The Court:) Now, Miss Handschu and gentlemen, do you have any requests or exceptions and, if you do, do you want to be heard on those outside the presence of the jury?
>
> Mr. Wagner: I have none, Your Honor.
>
> Miss Handschu: None.
>
> Mr. McLeod: None, Your Honor.
>
> The Court: All right, thank you. Swear the deputy marshals (App. 87).

Thus, McClamb cannot now complain of the Court's failure to give any particular instruction to the jury. See also Federal Rules of Criminal Procedure, Rule 30.

POINT V

The Court properly allowed use of two prior criminal convictions for impeachment of defendant McClamb.

Prior to trial, Judge Elfvin ruled that two prior convictions of the defendant McClamb could be used by the Government for impeachment purposes (App. 88, 89). While defendant McClamb has devoted a large part of his brief to the argument that the Court's ruling was improper, the Government responds merely by noting that the rules of evidence have traditionally allowed, and the Federal Rules of Evidence now specifically provide for impeachment of a defendant-witness by proving his convictions of a crime, where the crime (1) was a felony, with a determination by the Court that its probative value outweighs any prejudicial affect to the defendant, or (2) involved dishonesty.[2]

Judge Elfvin found that:

> The 1968 conviction is admissible under Rule 609(a)(1) of the Federal Rules of Evidence inasmuch as I find that probity re McClamb's credibility would outweigh prejudice to him—only slightly, admittedly. The 1974 conviction is admissible under Rule 609(a)(2) which neither requires nor allows such weighing inasmuch as it involved dishonesty or false statement (App. 89).

This was a proper exercise of Judge Elfvin's discretion, and his judgment fell within the guidelines of the Rules of Evidence; his decision should not now be disturbed on appeal.

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[2] Since both of McClamb's convictions were within the last ten years, Federal Rule of Evidence Rule 609(b) is not an issue.

Conclusion

For all of the reasons set forth above, it is respectfully submitted that the judgment of conviction for each defendant should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A.
vs
Leonard Johnson & LeRoy McClamb

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 76-1544

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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502 U.S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

17th day of February, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77